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September 26, 2008

E-FILE

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street S W
Washington, DC 20423

Re: STB Docket No. AB-1020X, East Penn Railroad, LLC – Abandonment
Exemption – In Berks and Montgomery Counties, Pennsylvania

Dear Acting Secretary Quinlan:

Attached for e-filing are the Motion For Leave To File Response To Protest and
Response To Protest

If you have any questions, please call me

Sincerely,



Karl Morell

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO AB-1020X

**EAST PENN RAILROAD, LLC
—ABANDONMENT EXEMPTION—
IN BERKS AND MONTGOMERY COUNTIES, PA**

**MOTION FOR LEAVE TO FILE RESPONSE TO PROTEST
AND
RESPONSE TO PROTEST**

**Karl Morell
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**Attorney for
East Penn Railroad, LLC**

Dated September 26, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO AB-1020X

**EAST PENN RAILROAD, L.L.C
--ABANDONMENT EXEMPTION--
IN BERKS AND MONTGOMERY COUNTIES, PA**

**MOTION FOR LEAVE TO FILE RESPONSE TO PROTEST
AND
RESPONSE TO PROTEST**

East Penn Railroad, L.L.C ("ESPN") hereby (1) seeks leave to file a response to the Protest filed by Berks County, PA (the "County") on September 9, 2008 in this proceeding (the "Protest"); and (2) responds to the Protest

BACKGROUND

On July 31, 2008, ESPN filed a Petition for Exemption ("Petition") with the Surface Transportation Board ("STB" or "Board") to exempt, under 49 U.S.C. § 10502, from the prior approval requirements of 49 U.S.C. § 10903, ESPN's abandonment of the 8.6-mile rail line located between milepost 0.0, at Pottstown, and milepost 8.6, at Boyertown, in Berks and Montgomery Counties, Pennsylvania (the "Line"). On August 20, 2008, the Board gave notice of the filing of the Petition and established September 9, 2008, as the due date for the submission of protests.

MOTION

ESPN seeks leave to file the following response to the Protest ("Response") The Protest seriously distorts the evidence set forth in the Petition and is riddled with misleading and erroneous statements which need to be clarified and refuted. The Response will not delay this proceeding and, in the interest of having a more complete record, ESPN urges the Board to accept the Response for filing. *See* STB Docket No. AB-369 (Sub-No 3X), *Buffalo & Pittsburgh Railroad, Inc - Abandonment Exemption - In Erie and Cattaraugus Counties, NY* (not printed), served September 18, 1998, STB Docket No AB-398 (Sub-No 7X), *San Joaquin Valley Railroad Company - Abandonment Exemption - In Tulare County, CA* (not printed), served June 6, 2008

SUMMARY OF RESPONSE

The Protest is an extremely irritating document. It does not inform or clarify, rather it distorts and misleads.

When the facts are inconvenient, the County ignores or distorts them. When the distorted data is inadequate, the County fabricates inaccurate or false data. Yet, with all the distortions and fabrications, the County's expert, Gary E. Landrio ("Mr. Landrio")¹ concludes that the Line was unprofitable in 2007, *albeit* not as unprofitable as the Line really was that year.

The County next identifies nine (9) "potential customers on or near the [Line]" Protest at 4-5. The Protest gives the concept "potential future traffic" new meaning since, as the County well knows, not one of the entities identified is located on the Line. Conveniently ignored is the fact that ESPN cannot serve these entities unless ESPN first constructs new rail lines which, in

¹ The County holds Mr. Landrio out as an expert but there is no resume in the Protest to substantiate the County's assertion.

order to avoid demolishing existing communities and existing non-rail businesses, could total 10 to 20 miles in length over land ESPN does not own. The construction of these new rail lines would take years to complete and cost millions upon millions of dollars.

The County makes no mention of who would pay for this folly or whether the traffic, which currently moves by truck, is rail competitive. Most of the traffic shipped or received by the entities identified by the County would entail movements of about 70 miles by rail, and involve 3 rail carriers and a transload to truck at either off-Line origin or destination. It is highly questionable whether a three-carrier rail movement over such a short distance with a transload could be competitive with trucks if these customers were located directly on the Line. It is virtually certain that this traffic would never cover the cost of constructing the new rail lines.

Only one of the so-called potential customers, Martin Stone Quarries ("Quarries"), actually expresses an interest in using rail service. But that interest is highly qualified and suspect. Quarries, which is located about 17 miles north of the end of the Line, states that it would be willing to ship half of its outbound traffic by rail if given "suitable financial incentives". Rod Martin Verified Statement ("VS"), at paragraph 10. In other words, Quarries would have ESPN spend millions of dollars to connect the Line to Quarries' facility and only then Quarries would consider shipping by rail if ESPN provides "suitable financial incentive". Hardly a ringing endorsement for rail service.

Not satisfied with the distorted and falsified cost data or the fabricated potential traffic, counsel for the County ("Counsel") step in the gutter and shamelessly malign ESPN's current management. ESPN's management is deemed "negligent" in overlooking the potential traffic [Protest at 11], accused of "abysmal failure to market" the Line, and portrayed as dishonest and

inefficient [Protest at 26] Quite frankly, ESPN management resents these irresponsible allegations. As is demonstrated below, the two individuals currently managing ESPN have a long and successful career in the railroad industry. Also, the irony of these accusations appears lost on Counsel since their client owned the Line longer than current management. Since the County was unable to attract a single carload of new traffic to the Line during its stewardship, Counsel's derogatory remarks would be better aimed at their own client.

The Protest is also internally inconsistent. The County claims that it "is seeking a short line railroad operator to replace ESPN" Mark Scott VS at 8. That result, of course, could be expeditiously achieved through the Board's offer of financial assistance procedures, but that would require approval of the abandonment. Counsel, on the other hand, repeatedly urge the Board to deny the Petition and force ESPN to re-file and demonstrate that the Line is unprofitable. But the County's own expert has already conceded that the Line is unprofitable. What useful purpose would be served by ESPN re-filing when all of the parties to this proceeding agree that the Line is unprofitable? Indeed, the County's own evidence demonstrates that the Line has been unprofitable for over thirty (30) years and exists today only because of extensive governmental subsidies. The subsidies are long gone and since the filing of the Petition the last transload customer has notified ESPN that it will no longer use the Line. The assets of this unprofitable and now dormant Line can be better utilized on ESPN's other active rail lines.

RESPONSE

A. Cost Evidence:

The County criticizes the hourly wages contained in the Petition (\$15 per hour), which, as the Workpapers demonstrate were calculated using system-wide wage costs per hour. The

County contends that in its discovery response ESPN refused to provide the “total number of employees or the total benefits paid to its workforce” Protest at 13 In response to Interrogatory No 11,² ESPN explained that

“The actual hourly wage cost per hour for the two individuals working on the Line is \$15.10, or almost identical to the system-wide average”³

The County accuses ESPN of engaging “in a pattern of providing highly evasive and non-responsive answers” because ESPN provided actual rather than system-wide data in its discovery responses Protest at 13 The accusation leaves one speechless

In the Petition, ESPN apportioned two full days of work each week for the two-man crew on the Line Mr Landrio claims that the crew should be able to complete all of their work in three hours a day. Protest at 13-14 Mr Landrio, however, totally ignores a number of necessary functions which are essential to service on the Line. The ESPN crew that serves the Line is based in Reinholds, PA, which is located on ESPN’s Lancaster Northern Branch where the crew works three days a week. ESPN’s Lancaster Northern Branch is longer than the Line, and requires three-day-a-week service and longer operating hours The Lancaster Northern line also has a suitable building to serve as the duty station for ESPN crews in this area, there are no railroad owned buildings located along the Line Based on these factors, ESPN decided to station the crew on the Lancaster Northern Branch rather than on the Line State and Federal law require railroads to maintain a duty station where certain information must be posted for employees For example, the Federal Railroad Administration (“FRA”) requires the maintenance of duty stations where the employer makes available to the employees such

² ESPN’s responses to the County’s discovery requests are set forth in Exhibit D to the Protest

³ The County’s expert witness should know the prevailing crew wages in the area and, not surprisingly, Mr. Landrio does not challenge ESPN’s hourly rate It is only Counsel, in their attempt to distort and confuse, that challenges the hourly rate.

information as monthly reporting of "Railroad Accidents/Incidents" reports. *See* 49 C.F.R. Part 225. The crew spends between two and three hours a day traveling between their duty station and the Line, which Mr. Landrio improperly fails to take into account.

Mr. Landrio also fails to allocate any time for the Federally mandated daily locomotive inspections (49 C.F.R. § 229.21) which typically take 30 minutes a day, including the necessary paperwork associated with the inspections. Also neglected by Mr. Landrio is the time needed: (1) to review work orders and bulletins, (2) for communications between the crew and headquarters both before starting work and upon completing work, and (3) for completing paperwork and time reports and forwarding those documents to headquarters. These necessary functions add an additional 30 to 40 minutes a day. In addition, Mr. Landrio fails to account for any time at the end of a run to secure cars and the locomotive. The crew also performs small and routine maintenance assignments. All of the functions performed by the crew and the time needed to perform the functions were set forth in detail in ESPN's response to Interrogatory 11 (Second), but ignored by Mr. Landrio. In order to complete their daily functions in the time allotted by Mr. Landrio, the crew would have to operate unsafely and violate a number of Federal and state laws. One would expect better from a purported "expert" who claims to have worked on numerous railroads.

The County also falsely claims that there is an "utter absence of system cost figures" in the Petition rendering ESPN's cost figures "unverifiable." Protest at 14. Again, this contention is a total distortion and misrepresentation of the information contained in the Petition. The Workpapers and information provided in discovery set forth system costs for every item where actual costs are not utilized or provided.

The County proceeds to accuse ESPN of triple-counting the cost of non-transportation activities performed by the two-man crew. Protest at 15. The track maintenance functions performed by the crew are not the sort of activities a shortline railroad would include under the Maintenance-of-Way account. The crew's maintenance activities are limited to such items as spot weed control to manage sight lines at crossings, removal of downed trees or the insertion of a gauge rod until proper repairs can be made. In other words, the crew's maintenance activities are associated with the safe operation of the train and not the proper maintenance of the track. These employees are not qualified track inspectors nor are there any track materials or equipment stored on site which would enable the operating crew to maintain the tracks. When actual track maintenance is performed, all of the labor, materials and equipment are brought from the Kennett Square, PA office.

The locomotive maintenance performed by the two-man crew consists of such activities as changing a brake shoe and adding water, sand or oil. The operating crew is not qualified to perform the functions included under the Maintenance of Equipment account. Those functions include the FRA mandated 92-day inspections, component change outs, and diagnostic activities and are performed either by ESPN's maintenance of equipment forces located at Kennett Square or one of two contract maintenance vendors utilized by ESPN. Also included in ESPN's Maintenance of Equipment account are parts, tools, and other supplies.

Counterintuitively, the County suggests that maintenance expenses for the 71-year old locomotive used on the Line should be less than the younger locomotives in ESPN's fleet.⁴

⁴ In their ongoing effort to distort and confuse, Counsel claim that ESPN's Workpapers "suggests (but does not state) that ESPN has a locomotive fleet of 13 engines." Protest at 16. WP 2 attached to the Petition provides as follows: "Total Active Locomotives: 13." To ESPN that is an unequivocal statement, to one who seeks to confuse it apparently is a suggestion.

Protest at 16 Because of the age of the locomotive, ESPN has had to special order parts and even such routine items as filters require special orders. By using system average costs, if anything, ESPN understated the locomotive maintenance expense.

Mr. Landrio claims that system average costs should not be used for the locomotive maintenance expense because the locomotive on the line is only used for a few hours a day and most locomotives on shortlines are used every day for at least eight hours. ESPN, however, is not your typical shoreline. On any given day, ESPN has 3 to 4 crews operating on its various rail lines. Not a single locomotive on the ESPN system is used every day and very few are used a full 8 hours per day. The locomotive on the Line is used less than a locomotive on a line with more frequent service, but it is also used more than some other units in the ESPN system. Thus, the use of system-average costs is accurate and appropriate. Mr. Landrio's use of 15 percent of the system-average locomotive maintenance expense is totally inappropriate since it is premised on the faulty notion that all other locomotives in the ESPN fleet operate every day for eight hours.

Counsel, ignoring Mr. Landrio's advice, claim that locomotive depreciation expense is unsupported. In the Workpapers, ESPN set forth the actual depreciation expense taken by ESPN in 2007 for the locomotive. In the discovery responses, ESPN provided the County a July 9, 2007 valuation of the locomotive and ESPN's Depreciation Expense Report, dated as of June 30, 2008.

In the Petition, ESPN attributed the actual electric expenses and the actual signal maintenance contractor expenses to the Line. Other avoidable General and Administrative expenses were prorated on a mileage basis. Mr. Landrio seeks to prorate these other expenses on a carload basis but in so doing comes to a completely erroneous result. Mr. Landrio claims that

system administrative expenses should be allocated on a per car basis rather than a per mile basis because the insurance expense, one of the many factors making up administrative expenses, is determined by the "total payroll and/revenue calculations" Landrio VS at 4. But Mr. Landrio ignores the fact that equally important factors in determining insurance rates are the number of miles operated and the number of rail/highway grade crossings. Mr. Landrio also ignores all of the other cost items included in the administrative expenses which are more accurately prorated on a mileage basis.

In making his recalculations, Mr. Landrio uses extraneous and unknown data. For example, Mr. Landrio determines that the total system administrative expenses were \$1,238,205 in 2007, whereas the actual amount is \$587,543.55, as set forth in the Workpapers. The miscalculation is due to the fact that Mr. Landrio uses the wrong ESPN system miles (251.1 postulated system miles versus the actual 120.1 miles).⁵ Mr. Landrio claims that he derived the mileage from the filing in STB Finance Docket No. 35056. However, there are no mileages contained in that filing. In any event, if one adds up the mileage for the lines set forth in footnote 1. of Landrio's Verified Statement, the total comes to 114.7 miles and not 251.1 miles as alleged by Mr. Landrio.⁶

Armed with a faulty mileage number, Mr. Landrio works "backwards" and arrives at a total system administrative expense for 2007 of \$1,238,205, rather than the actual expense of \$587,432. Mr. Landrio's next mistake is using incorrect system carloads for 2007. Mr. Landrio

⁵ In the Workpapers, ESPN identified the system miles as 120, and in response to Interrogatory No. 10, ESPN informed the County that ESPN's system-wide mileage was 120.1. One wonders why the County bothered to propound discovery since it ignores all of the responses provided by ESPN.

⁶ Mr. Landrio identified the following mileages for the individual ESPN rail lines: 25.6, 29.12, 1.8, 6.1, 4.1, 15.6, 10.2, 1.7, and 5 which equals 114.7. Apparently, Mr. Landrio's field of expertise does not extend to mathematics.

again ignores the correct total cars handled by ESPN in 2007 (4,809), as set forth in ESPN's Workpapers. Instead, Mr. Landrio uses a Railroad Retirement Board publication wherein it was reported that ESPN expects to handle 8,100 cars per year. But that projection was made for future years and not 2007. Because of the loss of a significant customer and the substantial downturn in carloads associated with the housing market, ESPN will not be able to achieve that projected number even in 2008.

Even with all of the above-noted errors and miscalculations, Mr. Landrio concludes that the Line incurred an **operating loss of \$19,099 in 2007**. But that was not what Mr. Landrio was paid to conclude. Consequently, Mr. Landrio goes on to portray these losses as short-term events. Landrio VS at 9. Mr. Landrio states "Looking at the revised revenue projection and revised cost figures this line can be profitable." *Id*. But the revisions to ESPN's cost data, as demonstrated above, are bogus and the "revised revenue projections" are non-existent. The County has accepted ESPN's revenue figures and not a single revenue projection prepared by the County is contained in the Protest. Mr. Landrio also conveniently ignores other evidence submitted by the County which shows that the Line has been unprofitable for over 30 years.⁷

B. Revised Forecast Year

As previously noted, the last remaining customer using the Line, Drug Plastic & Glass Company, Inc., notified ESPN on September 4, 2008, that it would no longer be transloading

⁷ For example, after the Reading Company went bankrupt the Line was deemed **not** to be economically viable by the United States Railway Association in 1976. *See* Scott VS, Exhibit 4, at 1. In the years after the Pennsylvania Department of Transportation ("PennDOT") acquired the Line, PennDOT provided \$1.3 million in subsidies to maintain the existence of the Line. *Id* at 3. Not surprisingly, all of the valuations cited by the County were for the net liquidation value ("NLV") of the Line and not the Line's going concern value, since the Line has not had a positive going concern value for 30 years.

traffic on the Line For simplicity sake, ESPN will continue to rely on the Forecast Year projections set forth in the Petition With no traffic remaining on the Line, however, the actual projections will be as follows

Revenue

Freight Originating and/or Terminating On-Branch	\$ 617
Bridge Traffic	0
Other Income	<u>1,800</u>
Total Revenues	\$ 2,417

On-Branch Avoidable Costs

ESPN's projected on-branch avoidable costs for the Forecast Year are as follows.

a Maintenance-of-Way and Structures	\$ 55,900 ⁸
b Maintenance of Equipment	14,915 ⁹
c Transportation	0 ¹⁰
d General & Administrative	25,559 ¹¹
e Deadheading, Taxi and Hotel	0
f Overhead Movement	0
g Freight Car Costs (other than return)	0
h Return on Value – Locomotives	6,582
i Return on Value – Freight Cars	0
j. Revenue Taxes	0
k Property Taxes	<u>1,969</u>
Total Avoidable costs.	\$104,925
Avoidable (Loss) or Profit.	(\$102,508)

C. Net Salvage Value.

The County also attempts to distort the asset values comprising the Line The County

⁸ Total costs remain the same as in the Petition

⁹ Total costs remain the same as in the Petition since ESPN will need to keep the locomotive on the Line until final abandonment approval is obtained

¹⁰ ESPN did incur some minor transportation costs removing empties off the Line but for simplicity sake will use zero costs

¹¹ Includes all of the costs set forth in the Petition The expenses, such signal maintenance costs, will continue to be incurred until the abandonment is approved and the Line is salvaged

accepts the highest salvage bid of \$1,082,000, received by ESPN but then distorts the bid

Without any evidence or supporting information, the County makes the false assertion that the bid is a gross bid and that ESPN has failed to provide the net salvage value Protest at 20-21.

Yet, as stated on the face of the bid, the bid is a net bid. "Net payment to ESPN" will be

"\$1,082,000.00." As with virtually all salvage bids for abandoned rail lines, the salvage

company is responsible for the removal costs, transportation costs, and restoration of grade

crossings The one major item that can vary is whether the salvage company also is obligated to

remove the bridges In the bid package sent to the salvage companies, ESPN specified that the

bridges were not to be removed Consequently, the \$1,082,000 bid is a net bid not a gross bid

and all of the costs associated with salvaging the Line, except for removal of the bridges, are

already deducted and accounted for in that bid

There will also be no costs associated with bridge removal because ESPN does not plan

on removing any bridges. ESPN has already agreed to negotiate a rail-banking agreement with

Montgomery County and plans on selling the portion of the Line in Montgomery County to

Montgomery County under the Trails Act. Although Berks County has filed in opposition to the

proposed abandonment, the Berks County Planning Commission adopted a new Berks County

Greenway, Park and Recreation Plan on December 20, 2007, which incorporates the Line into

the planned "Old Dutchman Trail" If the County pursues this option, none of the bridges in

Berks County will need to be removed Accordingly, none of the adjustments made by the

County to the track values are valid or appropriate Finally, even if the bridges are removed,

ESPN believes the salvage value would cover any removal costs

Even though he admits that he is not a certified real estate appraiser, Mr. Landrio

proceeds to give his opinion on the value of land First he claims discounts of 50 percent to 75

percent are necessary because the Line allegedly hugs "the banks of winding creek valleys" and because the "rail embankment is a ledge on steep sloping hillsides." Landrio VS at 7.

Apparently using an average discount value of 62.5 percent for every acre on the Line. Mr. Landrio assigns a gross value to the real estate of \$6,000 per acre from which he then takes the 13 percent discount recommended by ESPN

There are at least two major flaws in Mr. Landrio's appraisal (if one can call it that). First, Mr. Landrio incorrectly assumes that the entire corridor is located on the steep sloping hillsides which, of course, is not the case. The Line traverses downtown Pottstown and Boyertown where the most valuable real estate is located and no discount is appropriate. Second, Mr. Landrio fails to explain how he arrived at the undiscounted value. He cites to no comparable values in the area. Given the discounts used by Mr. Landrio, he necessarily used undiscounted values of \$12,000 to \$24,000 per acre. In the Petition, ESPN pointed out that it sold one parcel of land adjacent to the Line for \$162,679 per acre. Nevertheless, ESPN used an average per acre gross value of \$18,821 in order to take into account the fact that some parcels will need to be discounted because of the surrounding terrain. Mr. Landrio appears to have used this already discounted value and proceeded to discount it again by 62.5 percent. If Mr. Landrio had taken the time to check actual adjacent land values in the area, he would have quickly realized his mistake.¹²

¹² In his Verified Statement, the Chairman of the Berks County Commission, Mr. Mark C. Scott notes that the Line is located in southeastern Pennsylvania "in close proximity to the Philadelphia metropolitan area." Scott VS at 1-2. The Valuation Study attached as Exhibit 4 to the Scott VS, notes that Montgomery County is the most populous of the counties in the suburban Philadelphia area and that Berks County is located in the Reading metropolitan area. Does Mr. Landrio seriously believe that the undiscounted value of land in the area of the Line is \$12,000 to \$24,000 per acre?

The County elsewhere refers to a Wal-Mart store as a potential customer located on the abandoned railroad right-of-way north of the Line. According to Berks County records, the appraised value of the land the Wal-Mart store sits on, without any improvements, is \$163,197 per acre, or an amount very similar to the price ESPN recently received for its parcel. Taking Mr. Landrio's average discount factor of 62.5 percent, assuming for simplicity sake that the entire corridor needs to be discounted, and using the Wal-Mart per acre assessment, the value of the undisputed 60.8 acres held in fee would be \$3,720,892, less the 13 percent discount used by ESPN in the Petition. ESPN continues to believe the net real estate value of \$995,556, as set forth in the Petition, while very conservative, is the best evidence of record.

Finally in this regard, the County seeks to have the Board adopt a subsidy payment of \$156,822. But that amount is based on the 2007 avoidable loss calculated by Mr. Landrio. The County has failed to calculate an avoidable loss for the forecast year which is used to calculate the subsidy payment. As is demonstrated above, the County's 2007 avoidable loss is riddled with mistakes, erroneous assumptions, bad math and faulty data. The County's NLV calculations are similarly flawed. The County presents no independent NLV information, it simply takes ESPN's net values and applies discounts which have already been taken or which should not be taken. The County also fails to present any independent real estate values. Mr. Landrio fails to cite a single across the fence valuation from which discounts would be appropriate. Instead, he takes the net per acre values calculated by ESPN which are already heavily discounted and discounts those net values by another 62.5 percent.

On the other hand, the estimated subsidy payment of \$393,244 calculated by ESPN is very conservative, well-documented and supported and should be adopted by the Board.

D. Potential Rail Customers.

The County asserts that there are multiple potential customers for the Line including “quarries, foundries, concrete plants, manufacturing facilities and even a major national retailer (Wal-Mart)” Protest at 4. While there are many problems with the accuracy of this assertion, the major one is that not one of these “potential” customers is located on the Line. The County fails to explain how ESPN is to serve customers not located on or adjacent to the Line. Presumably, the County expects ESPN to build rail lines to these customers. But the County fails to identify new corridors that could be used, the cost of acquiring those corridors or the cost of constructing the new lines. In order to avoid destroying communities situated directly between the Line and the entities identified by the County, ESPN would need to build around them which could entail the construction of 10 to 20 miles of rail lines at a cost of millions of dollars. Attached as Exhibit 1, is a map illustrating the Line and most of the “potential” customers identified by the County.

One of the entities identified by the County is Trap Rock Quarries¹³ (“Trap Rock”) which is located one-airline mile from the Line. There are no existing corridors that would enable ESPN to access this facility. Moreover, the Trap Rock facility already has direct access to Norfolk Southern Railway Company (“NS”).

Berks Products is located in Gilbertsville, Pa. This facility is located approximately 1.5-airline miles from the Line but there is no existing corridor that would provide rail access from the Line to the facility. Lying directly between the Line and the facility are numerous homes and businesses as well as PA Route 100, a four lane limited access highway. The construction of a

¹³ Trap Rock is a subsidiary of Haines & Kibblehouse, another entity listed by the County. ESPN is unaware of any other facilities owned by Haines & Kibblehouse in the area of the Line.

direct rail line to this facility would necessitate the condemnation of the numerous homes and businesses. An alternative option would be to build a circuitous rail route around the homes and businesses

Cabot Supermetals Corporation ("Cabot") is an additional potential customer cited by the County. Cabot has sporadically used the Line in the past to transload occasional shipment of containerized hazardous waste. The Petition points out that Cabot shipped 7 carloads in 2007 and none in 2006. Cabot is not a new customer but a former customer that made little and sporadic use of the Line.

Boyetown Foundry ("Foundry") is located about 1,600 feet north of the end of the Line, along a corridor that was abandoned decades ago. In 2005, ESPN's predecessor assisted the Foundry in securing a grant from the PennDOT in the amount of \$202,000, for the reconstruction of track to serve the Foundry and the installation of a rail car loading/unloading facility within the plant at a projected cost of \$288,571. The project never progressed because the Foundry was unwilling to provide the required 30 percent matching funds (\$86,571), a strong indication of the low value Foundry places on rail service.¹⁴

Wal-Mart is another potential customer cited by the County. But the facility is a retail store, not a distribution center, and ESPN is unaware of any Wal-Mart store that utilizes rail service. Also, the only practicable way of extending rail service to that store would be via the abandoned rail corridor. However, Wal-Mart's parking lot is located directly on top of the corridor. The County proposes that ESPN give Wal-Mart a choice of rail service or parking for its customers.¹

¹⁴ ESPN has approached the Foundry but was informed that they are not interested in rail service.

The remainder of the so-called "potential" customers, Quarries, Rahn's Concrete, and Bechtelsville Asphalt, are located at a facility approximately 1.7 miles north of the end of the Line adjacent to a former rail line that was abandoned over 30 years ago. Over the years, the former corridor has been disassembled with sales to utilities and adjacent land owners such as Wal-Mart.

As previously mentioned, only one of the "potential" customers, Quarries, actually expresses an interest in rail service and that interest is highly qualified and suspect. Quarries' position seems to be that, if ESPN spends millions of dollars connecting to its facilities, Quarries would be willing to ship by rail if given "suitable financial incentives." Martin VS, paragraph 10. Mr. Landrio finds Quarries' interest in rail service "promising" (Landrio VS at 2), ESPN considers it highly suspect and questionable. In fact, Mr. Landrio admits that the County has not researched the "equipment, operational and marketing aspects of these moves" but finds them "promising." *Id.* What the County also has not researched is the most viable corridor to reach the "potential" customers, the cost of assembling the corridor and the cost of constructing the new rail lines. Also, to handle volumes of stone and sand would require upgrading the entire Line as well as ESPN's interchange facilities with NS in downtown Pottstown. These are no small matters but are totally ignored by the County. In addition, the County fails to explain what the "suitable financial incentives" would entail.¹⁵

ESPN has pursued stone and sand traffic moving between southeastern Pennsylvania and southern New Jersey from its other nearby rail lines which have quarry and cement facilities located directly on the line. ESPN's efforts have been unsuccessful even without the burden of

¹⁵ What is also mystifying is why Quarries would contact the County and not ESPN if it truly desired rail service. ESPN is not an unknown entity to Quarries. ESPN purchases all of its ballast from Quarries and Quarries leases property from ESPN in Nottingham, PA.

having to construct new rail lines because that traffic has proven to be extremely truck competitive.¹⁶

Counsel shamelessly malign current ESPN management for failing to market the Line. Robert Parker and Alfred Sauer, the co-founders of Regional Rail, LLC ("Regional Rail"), have long and successful careers in the railroad industry. Both joined RailAmerica, Inc. ("RailAmerica") in 1995 from different railroads and subsequently led the acquisition team that was successful in increasing the number of railroads in the RailAmerica family from 4 to 54.¹⁷ In 2003, Messrs. Parker and Sauer joined OmniTRAX, Inc. ("OmniTRAX") and in the following 4 years doubled the size of OmniTRAX's shortline railroad portfolio. In 2007, Messrs. Parker and Sauer left OmniTRAX to found Regional Rail, the parent of ESPN.

Messrs. Parker and Sauer have each spent the over 13 years growing shortline railroad operations. They view abandonment as the last resort for a line and would not be seeking to abandon the Line if there were any possibility of attracting sufficient traffic to make the Line economically viable.

The County's criticism of current management is also disingenuous given the history of the Line. For example, Mr. Landrio claims that he was responsible for managing the Line during 1984 and 1985 when it was owned by PennDot. Since Quarries has been in existence since

¹⁶ The southern New Jersey destinations that receive stone shipments are generally located some distance from the nearest rail unloading facility, thereby saddling the rail movement with the additional expense of transloading the stone from rail to truck and the expense of trucking the stone to final destination. These additional handling costs make rail movements more expensive than direct truck shipments in this market.

¹⁷ Mr. Parker's last position at RailAmerica was Senior Vice President Operations – Eastern Corridor, with responsibilities for 35 shortline railroads. Mr. Sauer's last position at RailAmerica was Senior Vice President Marketing – Chief Commercial Office, with responsibilities for all marketing and sales activities for 54 shortline railroads in the United States and Canada.

1953, one wonders why Mr Landrio did not pursue the Quarries traffic when he had the responsibility to do so. The Line was acquired by PennDot in 1982 and has had three operators prior to ESPN Anthracite Railroad, the Reading, Blue Mountain and Northern Railroad and Last Penn Railways. Not one of these operators was able to attract sufficient traffic to the Line to make it profitable. The County acquired the Line on June 8, 2001 and owned the Line for over two years. During that time period, not a single new customer was developed. ESPN's predecessor owned the Line for 4 years and was unable to attract new traffic. In summary, PennDot owned the Line for 19 years and could not develop new traffic, the County owned the Line for 2 years and could not develop new traffic, Fast Penn Railways owned the Line for 4 years and could not develop new traffic and ESPN has owned the Line for about 1 year and could not develop new traffic. There seems to be a consistent pattern, not one of intentional neglect by the owners and operators, but one of unwillingness by rail served industries to locate on the Line.¹⁸

E. County Seeks to Stand Abandonment Law On Its Head.

For nearly nine decades, the courts, the Board and its predecessor have consistently held that a railroad cannot be compelled to operate a rail line at a loss unless there is an overriding need by rail-dependent shippers for rail service. *See e.g., Brooks-Scanlon Co v R R Comm'n of La.*, 251 U.S. 396, 399 (1920) ("carrier cannot be compelled to carry on even a branch of business at a loss"), *R R Comm'n of Texas v E Tex R Co.*, 264 U.S. 79, 85 (1924) (compelling a railroad to operate at a loss would constitute an unconstitutional taking of property), *Purcell v United States*, 315 U.S. 381, 385 (1942) ("*Purcell*") (if costs cannot be justified by "reasonably

¹⁸ Mr. Scott is concerned about the County's ability to attract future rail served industries if the Line is abandoned. Scott VS at 7. The 8.6-mile Line, however, represents only 4.9 percent of the approximately 140 route miles of railroad located in Berks County.

predictable revenues,... the expenditures are wasteful [and contrary to] a stated purpose of the Transportation Act”), *Gibbons v United States*, 660 F 2d 1227, 1233 (7th Cir 1981)(“The constitutional principle embodied in these decisions retains its vitality, a railroad cannot be compelled to continue unprofitable operations indefinitely”).

There is no disagreement in this proceeding that the Line is being operated at a loss. the only disagreement is over the extent of the loss. At the same time, there are no rail-served customers located on the Line. In recent years, the Line has been used exclusively by two transload customers who have opted to shift their transloads to other nearby facilities. No current or potential customer located on the Line opposes the abandonment. Consequently, there are no shipper interests to balance against the Line’s losses.

Recognizing that the Line is unprofitable and having no rail-served customers on the Line, the County urges the Board to adopt a new standard which would stand nearly 90 years of case law on its head. The standard being advanced by the County would require a railroad first to **build out** to potential customers before it is allowed to come to the Board and seek abandonment authority. There seems to be no limit on the expenditures the railroad must incur or the added losses the railroad must suffer before it would be entitled to seek abandonment authority under the County’s theory. There is also no requirement that these off-line customers guarantee sufficient traffic to financially justify the build-outs. Nor is the County offering any subsidies. Instead, the County would have ESPN spend millions of dollars blindly **building out** rail lines to every potential customer in nearby communities to see if they will ship once rail service is available. The County cites no cases in support of its new standard because *understandably there are none*. As stated by the Supreme Court in *Purcell*, “[it] is well settled that a carrier cannot legitimately be required to expend money to rehabilitate a line where it will

lose money on the operation " *Purcell* at 385. See also *Chicago & N W Transp Co v Kalo Brick & Tile Co*, 450 U S 311, 325 (1981). The County's theory goes far afield from *Purcell* and would require a carrier to expend money to construct new lines.

As noted in the Petition, the Board and its predecessor have consistently rejected speculation about future traffic as a sound basis for denying the abandonment of an otherwise unprofitable rail line. In the cases cited in the Petition, all of the potential future traffic was from shippers located on the Line. Here, all of the potential customers cited by the County are located away from the Line and would require the construction of new rail lines.¹⁹

Apparently recognizing that well-established substantive case law does not support its Protest, the County, in desperation, claims that the exemption process is not appropriate for the abandonment of the Line and that ESPN should be forced to file an application. The County claims that the exemption process should only be used where shippers or public entities do not oppose the abandonment or where the revenue from traffic on the line is clearly marginal compared to the cost of operating the line. The abandonment of the Line, however, qualifies under this standard because no shipper located on the Line is opposing the abandonment and, even by the County's own calculations, the operating revenues are less than the cost of operating Line. Indeed, with the departure of the last shipper there no longer are any operating revenues associated with the Line. If the Line does not qualify for an exemption virtually no abandonment would qualify.

¹⁹ In STB Docket no. AB-433X, *Idaho Northern & Pacific Railroad Company – Abandonment Exemption – In Wallowa and Union Counties, OR* (not printed), served April 16, 1997, the Board granted the abandonment even though one shipper located directly on the line had projected 2,102 shipments a year. The abandoning carrier successfully argued that the Board should not count traffic currently moving by truck as potential rail traffic. The Board should apply that same principle in this proceeding.

The cases relied on by the County are readily distinguishable. In STB Docket No. AB-32 (Sub-No. 75X), *Boston and Maine Corporation – Abandonment Exemption – In Hartford and New Haven Counties, CT* (not printed), served December 31, 1996, actual shippers with increasing volumes of traffic opposed the abandonment and demonstrated that they would be seriously harmed by the proposed abandonment. Here the traffic has declined to zero and no actual shipper opposes the abandonment. In STB Docket No. AB-397 (Sub-No. 5X), *Tulare Valley Railroad Company – Abandonment and Discontinuance Exemption – In Tulare and Kern Counties, CA* (not printed), served February 21, 1997 (“*Tulare Valley*”), the Board denied a portion of the requested abandonment because the carrier had failed to present credible evidence that the line segment cannot be operated profitably. Here, the County’s own evidence demonstrates that the Line is being operated at a loss. Also, in *Tulare Valley* an actual shipper that had expanded its facilities based on continued rail service opposed the abandonment. In this proceeding, no shipper located on the Line opposes the abandonment. In STB Docket No. AB-398 (Sub-No. 4X), *San Joaquin Valley Railroad Company – Abandonment Exemption – In Kings and Fresno Counties, CA* (not printed), served May 23, 1997, the abandonment was opposed by actual shippers on the line. The Board denied the abandonment because the carrier had failed to demonstrate that it was operating the line at a loss and, in the Board’s view, the shippers’ concerns warranted a more thorough review. Here, the County concedes that the Line is being operated at a loss and no actual shipper opposes the abandonment.

In STB Docket No. AB-307 (Sub-No. 5X), *Wyoming and Colorado Railroad Company, Inc. – Abandonment Exemption – In Carbon County, WY* (not printed), served November 10, 2004 (“*WYCO*”), the Board denied the abandonment because the carrier had failed to submit cost evidence. Here, even the County concedes that the Line is being operated at a loss. Moreover,

WYCO is probably one of the best examples of why the Board should be very leery of future traffic projections. Although the line being abandoned in *WYCO* had been dormant for nearly two years, the new owner of a mill located directly on the line guaranteed that it would soon reopen the mill and ship sufficient volumes to make the line profitable. Eighteen months later when the Board finally approved the abandonment not a single carload of freight had graced the line. In this proceeding, the County seeks to have the Board take into account hypothetical traffic from shippers who are not located on the Line and cannot be served by the Line.

CONCLUSION

The County concedes that the Line was unprofitable in 2007 and that ESPN is incurring significant opportunity costs. The only dispute between the parties is the degree of the losses and foregone opportunity costs. Not one of the "potential" shippers identified by the County is located on the Line. In order to reach these "potential" customers, ESPN would have to spend millions of dollars constructing new rail lines. The last transload customer has stopped using the Line and Line now lies dormant. Under these circumstances, ESPN respectfully urges the Board to grant the requested exemption.

Respectfully submitted,

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Dated September 26, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and Response to Protest has been served on Counsel for Berks County, PA, by hand delivery this 26th day of September 2008

Karl Morell

Exhibit A: Distance to Alleged Customers in Boyertown

